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13
 14 IN THE UNITED STATES DISTRICT COURT
 15 FOR THE DISTRICT OF ARIZONA

16 IN RE: Bard IVC Filters Products Liability
 17 Litigation,

No. 2:15-MD-02641-DGC

**DEFENDANTS' MOTION AND
INCORPORATED MEMORANDUM
TO SEAL**

19
 20 Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively
 21 "Bard") hereby respectfully move this Court for an order, pursuant to the Stipulated
 22 Protective Order (Doc. 268), Federal Rule of Civil Procedure 26(c)(1)(G), and Local Civil
 23 Rule 5.6 sealing certain documents accompanying Bard's Notice of Supplemental
 24 Information Regarding FDA Inspection and Warning Letter. The exhibits that are the
 25 subject of Bard's Motion to Seal constitute trade secrets or other confidential research,
 26 development, or commercial information thereby warranting protection from public
 27 disclosure for a discovery related motion. Accordingly, there is good cause to grant
 28 Bard's Motion to Seal. The plaintiffs have noted during the meet and confer process that

1 they reserve the right to challenge any of the confidential designations pursuant to the
 2 Stipulated Protective Order (Doc. 269 ¶ 2) at a later time.

3 **ARGUMENT AND CITATION OF AUTHORITY**

4 In conjunction with Bard's Notice of Supplemental Information Regarding FDA
 5 Inspection and Warning Letter, Bard wishes to submit the following confidential
 6 documents to the Court for its consideration: FDA's Section 483 Observation from its
 7 February to March 2016 inspection of Bard's Glens Falls facility, and FDA's Section 483
 8 Observations from its February 2016 inspection of Bard Peripheral Vascular ("Documents
 9 at Issue").¹ The documents reflect Bard's confidential trade secrets and/or contain highly
 10 competitive, confidential, or proprietary information that warrants protection under
 11 Federal Rule of Civil Procedure 26(c)(1)(G) because the documents are not made public
 12 by Bard or the FDA and, if obtained by Bard's competitors, would give an unfair
 13 economic advantage to those competitors.

14 **A. Bard Asserts that the Documents At Issue Are "Confidential Information" Pursuant to the Stipulation for Protective Order, and Therefore They Should Be Sealed**

15 The Court has entered a Stipulated Protective Order to protect public disclosure of
 16 "Confidential Information," which includes any "'trade secret' or other confidential
 17 research, development, or commercial information' that is suitable for protection under
 18 Federal Rule of Civil Procedure 26(c)(1)(G)" Stipulated Protective Order (Doc. 269 ¶¶ 1,
 19 2.) Bard has designated the Documents at Issue in this motion as "CONFIDENTIAL" in
 20 its recent production of those documents during discovery (*Id.* ¶ 6). Finally, the
 21 Stipulated Protective Order states "All Confidential Information shall be used for the
 22 purpose of this lawsuit only . . . except as permitted by this Order." (*Id.* ¶ 12). These
 23 types of provisions are common in legal proceedings and are routinely enforced. *See, e.g.*,
 24 *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 307 (N.D. Ill. 1993) ("We hold
 25 that confidential information obtained by Culinary in this litigation may not be
 26

27
 28 ¹ The documents are attached as Exhibit A to Defendants' Notice of Supplemental Information Regarding FDA Inspection and Warning Letter.

1 disseminated to litigants in other cases against Raychem.”); *cf. Smithkline Beecham Corp.*
 2 *v. Synthon Pharmaceuticals Ltd.*, 210 F.R.D. 163, 169 (M.D.N.C. 2002) (refusing to
 3 modify protective order to allow plaintiffs to use confidential documents in other
 4 litigation). Thus, the Court should grant Bard’s Motion to Seal to maintain the
 5 confidentiality afforded by the Stipulated Protective Order to the Documents at Issue.

6 **B. The Documents at Issue Warrant Protection Pursuant to Fed. R. Civ. P.
 7 26(c)(1)(G) as Trade Secrets or Other Confidential Research, Development or
 8 Commercial Information, and Would Cause Bard Competitive Harm if Made
 9 Public**

10 Federal Rule of Civil Procedure 26(c)(1)(G) provides that the Court may, for good
 11 cause, “issue an order to protect a party or person from annoyance, embarrassment,
 12 oppression, or undue burden or expense, including . . . (G) requiring that a trade secret or
 13 other confidential research, development, or commercial information . . . be revealed only
 14 in a specified way.” “Good cause” exists when disclosure will result in “a clearly defined
 15 and serious injury to the party” seeking closure. *Blanchard & Co., Inc. v. Barrick Gold*
 16 *Corp.*, No. 02-3721, 2004 WL 737485, at *5 (E.D. La. Apr. 5, 2004) (citing *Pansy v.*
 17 *Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). In determining whether “good
 18 cause” exists, the court “must balance the requesting party’s need for information against
 19 the injury that might result if uncontrolled disclosure is compelled.” *Id.* The Court has
 20 wide discretion in determining the scope of an order protecting confidential research,
 21 development, or commercial information. *See id.*

22 The information contained in the Documents at Issue includes confidential business
 23 information concerning Bard’s validation and inspection procedures at its Glen Falls
 24 facility, and Bard Peripheral Vascular’s complaint handling and trending procedures. The
 25 Documents at Issue represent highly sensitive information related to ongoing FDA
 26 inspections which Bard will be responding to in the future. *See id.* The disclosure of
 27 these documents would be particularly harmful to Bard because the Section 483 procedure
 28 related to these documents is not yet complete.

Finally, because the documents at issue do not relate to a motion that requires

1 judicial resolution of this case on the merits, there is no general First Amendment right to
 2 access the Documents at Issue. *See, e.g., Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*,
 3 263 F.3d 1304, 1312–13 (11th Cir. 2001) (finding that “material filed with discovery
 4 motions is not subject to the common-law right of access, whereas discovery material
 5 filed in connection with pretrial motions that require judicial resolution of the merits is
 6 subject to the common-law right”); *United States v. Wolfson*, 55 F.3d 58, 61 (2d Cir.
 7 1995) (“We are not aware . . . of any common-law principle that documents submitted to a
 8 court in camera for the sole purpose of confirming that the refusal to disclose them to
 9 another party was proper, are to be deemed judicial records open to the public.”); *The
 10 Courier-Journal v. Marshall*, 828 F.2d 361, 363 (6th Cir. 1987) (newspapers had no first
 11 amendment right of access to discovery materials, despite the recognition that
 12 “proceedings [were] of intense public concern”).

13 For each of these reasons, Bard has met the good cause standard for protection of
 14 its documents by showing that public disclosure of the Documents at Issue will cause a
 15 clearly defined injury to Bard. *See Shell Exploration & Prod. Co. v. Robinson*, No.
 16 CIV.A. 01-1417, 2001 WL 1490954 (E.D. La. Nov. 20, 2001) (finding that good cause
 17 existed for sealing judicial record “out of an abundance of caution in order to protect trade
 18 secrets” even when the testimony at issue “would not be particularly illuminating,” the
 19 “testimony did not specify any particular trade secrets”). Accordingly, the Court should
 20 grant Bard’s Motion to Seal.

21 **CONCLUSION**

22 For the foregoing reasons, the Documents at Issue warrant protection as
 23 confidential research, development, or commercial information pursuant to Rule
 24 26(c)(1)(G). Accordingly, the Court should grant Bard’s Motion to Seal.

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1 DATED this 4th day of March, 2016.
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21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on March 4, 2016, the foregoing was electronically filed with
23 the Clerk of Court using the CM/ECF system which will automatically send email
24 notification of such filing to all attorneys of record.

25 s/Amanda C. Sheridan
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